

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

KEVIN MENEFEE

Plaintiff,

v.

UNITED STATES OF AMERICA,  
RICHARD L. DURBIN, JR.,  
JAMES F. GILLIGAN.

Defendant.

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SA 17CA0642  
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Case No. 17-CV-642

**NOTICE OF REMOVAL**

Defendant United States of America, Defendant, Richard L. Durbin, Jr., and Defendant, James F. Gilligan, by and through the United States Attorney for the Western District of Texas and the undersigned Assistant United States Attorney, hereby file their Notice of Removal with this Court removing the above-entitled action now pending as Case No. 41S1700242 in the Justice Court, Precinct No. 4, Place 1, Bexar County, Texas, and in support of this Notice of Removal state as follows:

1. On June 28, 2017, an action was filed as Case No. 41S1700242 in the Justice Court, Precinct No. 4, Place 1, Bexar County, Texas entitled *Kevin Menefee v. United States of America, Richard L. Durbin, Jr., and James F. Gilligan*. The basis of the claim was simply '1. Unnecessary pain and suffering during and surgery, 2. Complications from botched surgery of 4 levels L-2, L-3, L-4, L-5, S-1' against the United States of America, Richard L. Durbin, Jr., and James F. Gilligan. The new small claims Petition provides no date when the complained of surgery took place. The brief statement of claim sounds in tort and alleges what purports to be a medical

malpractice tort type claim. While the lawsuit names the United States as a party defendant, it also names Richard L. Durbin, Jr, the current United States Attorney for the Western District of Texas, and James F. Gilligan, a line Assistant United States Attorney from the United States Attorney's Office in the Western District of Texas. Significantly, this is a medical malpractice tort lawsuit. Importantly, however, neither Richard L. Durbin, Jr. nor James Gilligan, the above mentioned Department of Justice attorneys, had any medical/surgical involvement in any complained of acts or omissions regarding the back surgery or medical follow-up that forms the crux of the complainant's medical malpractice tort action. Rather, each named Department of Justice attorney in this brand new small claims lawsuit had only appeared in their official capacity as Department of Justice attorneys on behalf of the United States of America within the course and scope of their federal employment for the United States Attorney's Office, Western District of Texas, in the *first* 'Sergeant First Class Kevin Menefee's lawsuit removal' from the Justice Court, Precinct No. 4, Place 1, Bexar County, Texas to the local United States District Court as explained in the below footnote.<sup>1</sup> Additionally, the brand new and *second* small claims lawsuit by this Pro Se Plaintiff

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<sup>1</sup> . On May 1, 2017, an action was filed as Case No. 41S1700163 in the Justice Court, Precinct No. 4, Place 1, Bexar County, Texas entitled *Sergeant First Class Menefee v. Major Brian Hood*. The basis of the claim was simply "1. Pain and suffering. 2. Complications from Surgery" without further explanation against Major Brian Hood, who is a medical doctor. When performing the questioned surgery, Major Brian Hood was an employee of the Department of the Air Force and was an active duty surgeon assigned to the San Antonio Medical Military Medical Center. This earlier small claims court case was then removed to the local federal district court on or about May 25, 2017 in Civil Action No. SA-17-cv-00468, *Sergeant First Class Kevin Menefee v. Major Brian Hood*, United States District Court, For The Western District of Texas, San Antonio Division. Procedurally, in federal district court, the United States of America was then substituted 'for and on behalf of Major Brian Hood as a defendant' and Hood was then dismissed out of the lawsuit in his individual capacity. (Doc. No.4). Additionally, on the same date, the federal district court ordered that the United States: "... be allowed to file its response to the Plaintiff's Original Complaint/Petition on or before sixty (60) days after service is made on the United States Attorney in accordance with Fed. R. Civ. P. 4(i)(1)(a)." Presumably, this new small claims court filing arises from the same core nucleus of operative facts surrounding the earlier mentioned surgeon and spine surgery in this matter that had already been removed to federal district court. As of

appears to again repeat in the complaint the same core surgical/medical operative nucleus of facts identified in the *first* 'Sergeant First Class Kevin Menefee's lawsuit removal' that discussed an alleged medical malpractice tort claim, but this new matter's language no longer names the government surgeon-Major Brian Hood. Plaintiff instead names the United States and adds the two Department of Justice attorneys-whose names only first appeared in the *first* removal action in their official capacity while representing the United States of America for the local U.S. Attorney's Office for the Western District of Texas. A copy of Plaintiff's Petition is attached hereto as **Exhibit 1**. Further, the service of the Citation and Petition on the United States has never been properly made, and the United States reserves such defenses. Pursuant to the provisions of 28 U.S.C. § 1446(a), there are no other pleadings, orders, or process in the State court action. Attached hereto as **Exhibit 2** is a copy of the docket sheet for the state court action.

2. This Notice of Removal is made pursuant to the provisions of 28 U.S.C. § 2679(d)(2) (state court suits against a Government employee), 28 U.S.C. § 1442(a)(1) (state court suit against a federal agency) and the applicable provisions of 28 U.S.C. § 1441, *et seq.*, in that this is a suit for money damages sounding in tort. Plaintiff alleges medical malpractice and seeks alleged tort damages claiming an alleged '1. Unnecessary pain and suffering during and surgery, 2. Complications from botched surgery of 4 levels L-2, L-3, L-4, L-5, S-1' from what appears on its face to be the same core nucleus of operative facts involving Major Brian Hood, an employee

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this writing, the Pro Se plaintiff has not complied with Fed. R. Civ. P. 4(i)(1)(a)). Why the Pro Se Plaintiff added as Defendants, Richard L. Durbin, Jr., United States Attorney for the Western District of Texas and James F. Gilligan, Assistant United States Attorney, who have only appeared on the prior lawsuit in their official capacity as attorneys for and on behalf of the United States Of America through the United States Attorney's Office, United States Department of Justice, is unclear given the lawsuit's context of an alleged medical malpractice tort claim, unless it represents an ineffective attempt at service of process on the United States without realizing that exclusive jurisdiction resides in the United States District Court according to 28 U.S.C. § 1346(b)(1) as shown by the first removal.

of the Department of the Air Force, who was also acting within the course and scope of his employment with the Department of Air Force at the time of the alleged incident as shown in the 'Notice of Removal' and attachments filed in Civil Action No. SA-17-CA-00468, *Sergeant First Class Keven Menefee v. Major Brian Hood*, United States District Court, Western District of Texas. The new small claims lawsuit also now names Richard L. Durbin, United States Attorney, and James F. Gilligan, a line Assistant United States Attorney, who both had only first appeared in their respective official capacities as federal employees working as attorneys for the Department of Justice in the *first* described 'Sergeant First Class Kevin Menefee's lawsuit removal.' By virtue of this provision, and as reflected in the Notice of Substitution of the United States as defendant and Memorandum in Support thereof, filed simultaneously herewith, the United States is substituted on behalf of both, Richard L. Durbin, Jr., and James F. Gilligan, practicing Department of Justice attorneys in the course and scope of their federal employees, as the sole proper party defendant in this action by operation of law. A true and correct copy of the certification of Acting Civil Chief, John J. LoCurto is attached as **Exhibit 3**.

3. To date, the United States Department of the Air Force, United States Department of Justice and/or United States of America have not been properly served with the Citation and Complaint by the Plaintiff. In this regard, the agencies and/or the United States of America would request that proper service of the Complaint and Citation be effected to fully comply with the requirements of Rule 4(i)(1), Fed.R.Civ.P.

4. Pursuant to the provisions of 28 U.S.C. § 1446(d), a Notice of Filing Notice of Removal has been filed with the Justice Court, Precinct No. 4, Place 1, Bexar County, Texas, a true and correct copy of which is attached hereto, marked as **Exhibit 4**.

5. Pursuant to Local Court Rule CV-3(a), a JS 44, Civil Cover Sheet is attached hereto

as **Exhibit 5**. As this federal case is being initiated via removal, a Supplement to JS 44 is attached hereto as **Exhibit 6**.

WHEREFORE, the United States of America provides this Notice that the action now pending in the Justice Court, Precinct No. 4, Place 1, Bexar County, Texas, is removed to this federal district court for all further proceedings.

Respectfully submitted,

**RICHARD L. DURBIN, JR.**  
United States Attorney

By: /s/ James F. Gilligan  
JAMES F. GILLIGAN  
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ATTORNEYS FOR DEFENDANT,  
UNITED STATES OF AMERICA

**CERTIFICATE OF SERVICE**

I hereby certify on the 17th day of July, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system and hereby certify that I have sent this filing by certified mail, return receipt requested through the United States Postal Service to the following non-CM/ECF participants:

KEVIN MENEFEE  
Sergeant First Class  
7345 Estrid Trail,  
San Antonio, Texas 78244  
Plaintiff – Pro Se

/s/ James F. Gilligan  
JAMES F. GILLIGAN  
Assistant United States Attorney